United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

561

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,323

UNITED STATES OF AMERICA,

Appellee,

v.

THOMAS A. DADE,

Appellant.

On Appeal from a Judgment
of Conviction in the United States
District Court for the District of
Columbia

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(Appointed by this Court)

888 Seventeenth Street, N. W.
Washington, D. C. 20006

August 7, 1969

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TABLE OF CASES

*Cases principally relied upon are marked with astericks.

ISSUES PRESENTED

1. Whether the District Court in this post-Wade identification case erred in refusing to exclude from evidence an in-court identification by the lone eye witness which was based on a post-arrest, in-custody, single-suspect confrontation at the police station in the absence of counsel.

2. Whether there was sufficient evidence aside from the in-court identification of appellant as the driver of the vehicle to sustain his conviction as an aider and abettor in the unauthorized use of a motor vehicle and in the interstate transportation of a stolen motor vehicle.

This case has not been previously before the court.

REFERENCES AND RULINGS.

The rulings and instructions of the District Court involved on this appeal are found at the following pages of the transcript:

1. Tr. 26, 74-75, 81, 82, 84 (rulings concerning admissibility of in-court identification and applicability of Wade doctrine).

2. Tr. 83 (ruling with respect to procedure of submitting identification evidence to jury with counsel free to move for judgment of acquittal in event of conviction).

3. Tr. 279-280 (ruling concerning sufficiency of evidence to support conviction as aider and abettor).

4. Tr. 302 (flight and concealment instruction).

5. Tr. 305-307 (aiding and abetting instruction).

6. Tr. 311-312 (instruction regarding guilt of a passenger in an unauthorized use case).

7. Tr. 328 (ruling with respect to sufficiency of evidence to sustain conviction on aider and abettor theory).

8. Tr. 332, 339 (ruling in answer to request of jury whether aiding and abetting instruction also applied to count of indictment charging interstate transportation of stolen motor vehicle).

9. The Court's denial of defendant's motion for judgment of acquittal notwithstanding the verdict was without findings or opinion and is endorsed on the cover of the motion.

With respect to Point I of the Argument below, it is desired that the Court read the following pages of the Reporter's Transcripts:

Tr. 15, 18-22, 45-51, 52-54, 56-59, 63-70, 75-77, 81-82, 84, 86-87, 88, 94, 99, 106-107, 112-113, 115-116, 216-221, 228-229, 256-257.

It is also requested that the Court examine the following exhibits introduced by the Government at the trial:

Government Exhibits 2, 3, 4, 5, 6, and 7.

With respect to Point II of the Argument below, it is desired that the Court read the following pages of the Reporter's Transcripts:

Tr. 12-13, 66-67, 87, 107-108, 113-114, 115-116, 203, 210, 245, 251, 257, 261-262, 275-276, 279, 302-303, 305-308, 311-312, 322, 327-329, 332, 334-337, 339.

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STATEMENT OF THE CASE

1. Jurisdiction

This is an appeal from a judgment of conviction for unauthorized use of a vehicle within the District of Columbia (22 D.C. Code 2204) and interstate transportation of a stolen motor vehicle (18 U.S.C. 2312). The judgment was entered on August 9, 1968, pursuant to a jury verdict of guilty rendered

on June 12, 1968. Appellant, who was 19 years of age at the time, was sentenced to an indeterminate term of imprisonment pursuant to the provisions of the Federal Youth Corrections Act (18 U.S.C. 5010(b)). His application for leave to proceed on appeal without prepayment of costs was granted by the District Court on August 20, 1968. Jurisdiction to decide this appeal is vested in this Court by virtue of Sections 1291, 1294 and 1915 of Title 28 of the United States Code (28 U.S.C. 1291, 1294, 1915).

2. The Facts

Returned on February 6, 1968, and filed in open court on March 28, 1968, the two-count indictment charged that on or about January 29, 1968, within the District of Columbia, appellant took, used, operated and removed a certain automobile without the consent of its owner in violation of 22 D.C. Code 2204 and on the same date transported such vehicle in interstate commerce from the District of Columbia to the State of Maryland well knowing that the vehicle had been stolen in violation of 18 U.S.C. 2312. Trial was held on June 10 and 11, 1968, before Judge Gasch and a jury.

The Government's principal witness was Officer Richard Gurley of the Baltimore County Police Department who was patrolling in a scout car in the vicinity of Towson, Maryland near the Baltimore circumferential highway on the evening of

January 29, 1968 (Tr. 15, 18). At 11:24 p.m. (Gov't. Exhibit 3, p.1), Officer Gurley began a routine check of a 1964 Pontiac automobile bearing District of Columbia tags which was parked with lights out by the curb on an unlighted, tree-lined street (Tr. 56, 99) and which was occupied by three Negro males (Tr. 19-21). The Officer did not know at the time and there was no reason to believe that the automobile had been reported stolen in the District of Columbia by its owner.

The principal controversy at the trial involved the identification by Officer Gurley of the appellant as the person sitting behind the steering wheel of the vehicle in question and as the driver of the car when it was subsequently driven away following the officer's attempts to question the occupants. In view of defense counsel's objection to the proffered in-court identification of appellant as the driver of the vehicle (which identification was based largely on a post-arrest, uncounseled confrontation between the officer and appellant at the station house), the trial court excused the jury and conducted an evidentiary hearing to determine the applicability in the present case of the Wade-Gilbert-Stovall doctrine prohibiting the admissibility of certain identification evidence (Tr. 22-23).

The following facts were adduced at this hearing and at the resumed trial after the Court ruled that the jury could hear the identification evidence. When Officer Gurley approached

the car in question--which, as indicated, was parked with lights out on a dark, tree-covered street--he shined his flashlight into the car and asked the person behind the wheel for his driver's license and vehicle registration (Tr. 46). Officer Gurley had the occupants of the vehicle in his light and under observation for a total of only "[a]pproximately a half a minute" (Tr. 46), but the time he had the light on any particular face in the car was just a few seconds each (Tr. 54). Indeed, as the Officer testified with respect to his observation of the person in the driver's seat (Tr. 46):

> "Q. [By Assistant U.S. Attorney Rauh] And during this half a minute, how much time were you directed to observe the defendant's facial features?
>
> A. Very little time. I was observing his movements more than his facial features."

The length and nature of this period of observation was again referred to by Officer Gurley when he further testified on direct examination (Tr. 86):

> "Q. Officer Gurley, after you alighted from your automobile and crossed the street and approached the 1964 Lemanns [sic] Pontiac would you tell us what happened?
>
> A. I shined my flashlight into the car briefly checking the subjects in the car and asked the driver for his driver's license and registration. The driver moved around a little bit inside the car and then started the car and took off down the road."

When the Pontiac sped away, Officer Gurley returned to his patrol car, made radio contact with headquarters (Gov't.

Exhibit 6), and gave chase. A few moments later he found the Pontiac car abandoned in the parking lot of an apartment complex and reported to headquarters (id., p.1):

> "Car 413 [Gurley] to headquarters. I pulled up on the car behind them. They were gone out of the car. Car door is open on the right side."

The verbatim transcript of the radio communications between Officer Gurley and police headquarters confirms the Officer's inability to provide a specific description of any of the occupants of the Pontiac, including the driver. Thus:

> "Headquarters to Car 413. How many colored subjects and do you have any description[?]
>
> Car 413 to headquarters. Three. Two in front and one in back. Driver had sweater and suede-type jacket over the sweater. That's all I could get". (Gov't. Exhibit 6, p.1; emphasis added).

Yet describing to the Court at the trial his ability later that night at the police station to identify appellant as the driver of the stolen vehicle, Officer Gurley testified as follows (Tr. 48-49):

> "THE COURT: How did you know it was the man you had seen [in the Pontiac]?
>
> THE WITNESS: From the observation I made when I checked the car the first time.
>
> THE COURT: What did you observe?
>
> THE WITNESS: The face of the subject and his clothing.
>
> THE COURT: What about his face attracted your attention?
>
> THE WITNESS: The characteristics of his face, sir.
>
> THE COURT: Such as what, sir?

THE WITNESS: The shallow jaw and the forehead.

THE COURT: What about the forehead, sir?

THE WITNESS: It stood out on his face; it was more distinguished than the rest of his face.

THE COURT: And what do you mean by distinguished?

THE WITNESS: The jaws and cheeks all came up and sort of - - -

THE COURT: Officer, what do you mean by distinguished?

THE WITNESS: When you looked at the face your attention was drawn to the forehead."

Notwithstanding this characteristic drawing one's attention to the forehead of appellant, Officer Gurley admitted that during his brief and limited observation of the driver of the Pontiac at about 11:25 on the evening of January 29, 1968, he had failed to notice a scar on the forehead of this person (Tr. 49-50). Appellant has and at the time in question had a scar squarely in the middle of his forehead (Gov't. Exhibits 4, 2, p.4; Tr. 54).

In any event, following the Officer's radio description to headquarters on the night in question, an alert to all police cars in the area was put on the air at about 11:56 p.m., advising them to be on the watch for three "colored males" (no further description was given) and particularly to check out any car observed with three colored male occupants as it was feared "they will probably pick up another car in this area" (Gov't. Exhibit 3, p.2).

At approximately 12:06 a.m. (January 30, 1968), the Maryland State Police advised Towson Police Headquarters that three Negro males were seen walking east on the westbound lane of Route 695 (Baltimore circumferential)(id., at p.3) and some three or four minutes later appellant and his two companions were arrested by Officer Engle of the County Police on the Baltimore Beltway approximately one mile from the site where the Pontiac had been abandoned (Tr. 66, 113-115, 117). This Officer testified that the three persons he took into custody appeared to have been running; that they were sweating, breathing heavily, and that their clothing was muddy (Tr. 115). With respect to specific identification, Officer Engle testified on direct examination as follows (Tr. 115-116):

> "Q. [By Mr. Rauh] Now, Officer Engle, are you able today to recall or recollect any of those individuals you observed?
>
> A. No, I could not identify them. It was just brief, two or three minutes that I had contact with them.
>
> Q. So you cannot identify this defendant here?
>
> A. No, I could not."

Appellant and his two companions were transported to the County Police Station at approximately 12:12 a.m. and Officer Gurley was called in from the scene of the abandoned Pontiac "to try to identify subjects" (Gov't. Exhibit 3, p.5). He reached the station at approximately 12:25 a.m. where the three suspects were being held in three separate interrogation rooms

(Tr. 68). He viewed each of the suspects and, as he recalled the circumstances in Court (refreshing his memory by reference to the police report of these events which he had filled out on the day in question (Tr. 89, 91)), Officer Gurley testified that he recognized appellant because he was wearing "a dark sweater of a heavy-type material used for winter wear" (Tr. 89) which was the same sweater he had observed under the jacket of the driver of the Pontiac when he initially stopped the vehicle(id.).

Arrest photos, however, taken a few hours after this station house confrontation at approximately 8:00 a.m. (Tr. 206) established that appellant was wearing neither a suede jacket nor a sweater (Gov't. Exhibit 4; Tr. 216-221). The Government suggested, however, that a dark shirt one of the suspects--Eddie Patterson--was wearing at the time of the arrest photos could be "interpreted" as a sweater (see Gov't. Exhibit 5; Tr. 204), and that the suspects must have switched clothing while confined to the same cell following the identification but preceding the taking of the arrest photos (Tr. 204, 218-219). Officer Gurley, however, missed the cue and testified that this ordinary sport shirt appeared "to be a leather material, a suede-type" (Tr. 221). The missing sweater was not found in the cell block occupied by the suspects (Tr. 219), and there was no indication as to what happened to the "suede-type jacket" referred to in Officer Gurley's original description of the driver (Gov't. Exhibit 3, p.1).

Finally, the Government introduced into evidence the plain copper key that was found in the ignition of the stolen vehicle (Gov't. Exhibits 7 and 2, p.4) to show "guilty knowledge of the car being stolen" (Tr. 210). "When you see an unusual looking key like this alone in an automobile, it supports the inference that the car was started with a non-owner's key" (id.).

The District Court ruled that on these facts there was "an appropriate basis for the witness Gurley to make an in-court identification of the defendant...." (Tr. 84), but indicated to counsel for the defendant that the Court would entertain a motion based on the identification cases in the event the jury convicted (Tr. 81). At the Government's request and over objection, the Court submitted the case to the jury on two alternative theories, i.e., that if appellant was the driver of the stolen vehicle, he could be found guilty of unauthorized use as a principal, or that if he were merely a passenger with knowledge that the vehicle had been stolen, and if he had taken some affirmative step in furtherance of the crime, he could be found guilty of unauthorized use as an aider and abettor (Tr. 305-308, 311-312).

The jury interrupted its deliberations to send a note to the Court asking if this aiding and abetting instruction was also applicable to the charge of interstate transportation of a stolen motor vehicle (Tr. 321). Following the Court's answer in the affirmative (Tr. 339), the jury returned its verdict of

guilty as charged on both counts of the indictment (Tr. 340). Defendant's motion for judgment of acquittal notwithstanding the verdict was denied without opinion and the present appeal followed.

ARGUMENT

I. The In-Court Identification of Appellant as the Driver of the Stolen Car Was the Product of an Unlawful Station House Confrontation and Should Have Been Excluded.*

As detailed more fully in the Statement of Facts, supra, it is undisputed that the confrontation between Officer Gurley and appellant occurred:

1. In an interrogation room,
2. At the County Police Station in Towson, Maryland,
3. With no one else present in the room,
4. Approximately one hour after Officer Gurley first approached the stolen vehicle,
5. After a police radio bulletin was broadcast for all cars to be on the alert for three Negro male subjects who had fled on foot,
6. After appellant and his two companions had been arrested on the Baltimore Beltway some distance away and removed to the station house to await identification as those three persons, and
7. In the absence of counsel.

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* The Transcript pages appellant wishes the Court to read with respect to Point I are set out at p. iii, supra.

Yet the District Court ruled that Wade,[1] Gilbert[2] and Stovall[3] were inapplicable and would not bar an in-court identification based on this confrontation. First, the District Court noted (Tr. 75):

> "I think every time since Wade and Gilbert there has been a lineup for identification purposes in the interest of basic and fundamental fairness counsel should be called so that he can see to it that the lineup is fair and not impermissibly suggestive. Here you don't have any lineup at all."

Second, the necessity for prompt identification when recollections are fresher permits the use of the contested identification evidence in the present case (Tr. 82). And finally the Court stated (Tr. 84):

> "...[I]t is better to have the identification at the scene rather than the suggestive atmosphere of a police station. I think although this identification did take place at the police station that insofar as the witness Gurley is concerned, as a police officer, it seems it would not be suggestive insofar as that type of witness is concerned. It might be suggestive if a non-police witness were involved."

These observations and the Court's refusal in the circumstances of this case to exclude the tainted in-court identification of Officer Gurley reflect a fundamental misunderstanding of the Wade doctrine and require reversal.

As this Court recently noted in requiring counsel at preliminary hearing identifications in General Sessions, (Mason v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___

1/ United States v. Wade, 388 U.S. 218.

2/ Gilbert v. California, 388 U.S. 263.

3/ Stovall v. Denno, 388 U.S. 293.

No. 21,818; Slip Opinion, dated June 30, 1969), the opinion in Wade speaks in broad and sweeping terms. See also Russell v. United States, ___ U.S.App.D.C. ___, ___F.2d ____ (No. 21,571; Slip Opinion dated January 24, 1969). While directly concerned only with a post-indictment lineup, the Supreme Court declared (388 U.S. 218, at p.228):

> "[T]he confrontation compelled by the State between the accused and the victim or witness to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."

Such dangers make a post-indictment lineup a "critical stage" of the criminal process at which the presence of counsel is required, and as this Court described the Wade opinion in Mason (Slip Opinion, p.4):

> "The Court suggested no reason why other identification confrontations should be any less 'critical'. Indeed, the only argument against a counsel requirement recognized by the Wade Court is that it might forestall prompt identifications--a danger not relevant to post-indictment lineups; and the Court suggested only that 'substitute counsel' might be a permissible means of avoiding this danger."

Notwithstanding the broad reach of the Wade language, this Court ruled in Russell, supra, that the rationale does not apply to on-the-scene identifications occurring moments after the offense.[4/] This apparent exception to the Wade

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4/ The Russell Court stressed, however: "We wish to make it clear that the holding of this case approves only those on-the-scene identifications which occur within minutes of the witnessed crime" (Slip Opinion, p.6, n.20). See also Solomon v. United States, ___U.S.App.D.C. ___, ___ F.2d ___ (No. 22,155; Slip Opinion, dated February 12, 1969, at p.3).

requirement was warranted, said the Court, because of two closely related, countervailing policy considerations militating against delaying identification confrontations in these on-the-scene circumstances: Delay to obtain counsel for a lineup involving a suspect found near the scene of the crime and only moments after it occurred might (1) detract from the reliability of a very fresh identification and (2) result in unnecessary detention of an innocent suspect. Neither of these militating circumstances exists in the present case.

In the first place, as the undisputed evidence makes clear, the identification here was not "on-the-scene" and it did not occur only "within moments of the witnessed crime," as required by the Russell exception. Appellant and his companions were already under arrest and had been removed to the County Police Station at Towson before Officer Gurley returned to make his identification. Fully an hour had expired between the time of the initial confrontation on the street and the station house identification. This removal in time and space should preclude any argument that a Wade exception is necessary here to preserve the reliability of "a very fresh identification" (Mason v. United States, supra, Slip Opinion, pp. 4-5, n.12). Further on the point of possible detraction from the reliability of an identification, Officer Gurley was presented to the jury and Court as an Officer trained in modern methods of police investigation, including presumably techniques of observation and identification, and as such was not likely to make a mistake.

See, e.g., Statement of Assistant United States Attorney, (Tr. 74) ("...[W]e have here not a lay citizen eye-witness, but we have a police officer of some experience..."). 5/ Surely this training and experience as a police officer is a two-way street, and there is absolutely no reason to believe that the officer's images and impressions relative to identification, meager though they were, would not "keep" until lawful identification procedures could be arranged.

Equally without merit is the argument--advanced below (see Tr. 81)--that it was necessary to dispense with the requirement of counsel in the present case in order to avoid unnecessary detention of innocent suspects. As far as the Baltimore County police were concerned, there were no innocent suspects in this case. They knew they had the three occupants of the abandoned car and that each could be charged, either as a principal or an aider and abettor. The only problem was to sort them out as to driver and passengers. That no such desire promptly to release innocent suspects exists in this case is made abundantly clear by the fact that appellant's two companions were not released from custody until the afternoon of January 31, 1968, at 1:45 p.m. (and then only "due to lack of prosecution by the Washington, D. C. Police" (Gov't. Exhibit 2, p.8))--fully 36 hours following the uncounseled station house confrontation between appellant and Officer Gurley.

5/ Compare the trial Court's statement that a police officer is not subject to the same suggestive influences and tendencies in an identification context as a lay witness (Tr. 84).

Indeed, the concern in this case--or the lack of it--for constitutional rights is further evidenced by the fact that appellant was not presented to the United States Commissioner until February 7, 1968, and remained without the appointment of counsel until March 28, 1968, the date of the return of the indictment.

While unlikely, the Government may argue here--as it did in Mason, supra--that in any event counsel was not required since there was nothing that could have been done to improve the reliability of the identification procedure. Such a contention would be absurd on its face in the present case, of course, for the most obvious defect in this procedure was the failure to conduct a lineup. See Wright v. United States, ___ U.S.App.D.C., 404 F.2d 1256 (1968). This deficiency fairly leaps to the eye in the context of three arrested suspects, known by the police to have been occupants of the stolen automobile, with the only problem being identification of one of the three as the driver. Since in the eyes of the police, however, all were probably guilty either as a principal or an aider and abettor, this was really no problem, and even a toss of a coin would provide a 33 1/3% chance of correctly "identifying" the driver. It is not at all fanciful to imagine that exactly such a process occurred here, and, contrary to the trial Court's belief that police officers are not susceptible to any suggestive implications in these single-suspect confrontations, it is submitted that there was strong psychological pressure on Officer Gurley to identify someone as the driver of the

stolen vehicle. Compare Mason v. United States, supra. Otherwise, all three occupants of the car--although at least one was most certainly guilty--would go free. Moreover, Officer Gurley, negligently or not, had allowed the suspects to escape in the first instance and a prompt identification at the station house could have promised to get him out of some very hot water. As this Court said of a similar situation in Mason (Slip Opinion, p.12):

> "Without questioning [the witness'] sincerity or intelligence, we cannot ignore the fact that such circumstances maximize the dangers inherent in single-suspect identifications."

Nor is it open to the Government to argue that the in-court identification was admissible on any "independent source" theory. The Government contended in the District Court (Tr. 76-77):

> "We feel that this meets the criteria of Roosevelt Wright [Wright v. United States, 404 F.2d 1256, supra] in determining that his in-court identification is based upon observations of the suspect other than the station house identification. This Officer has testified that he can make it because he observed him in the automobile and not because he observed him in the station house."

Wright, of course, involved a due process challenge to a pre-Wade identification; there was no claim there--and in view of the prospective application of Wade announced contemporaneously in Stovall there could be no claim--that the uncounseled confrontation violated appellant's Sixth Amendment rights. In such a pre-Wade context, even an improper confrontation otherwise violative of due process would not infect an

in-court identification "shown by clear and convincing evidence to have an independent source" (Solomon v. United States, supra, Slip Opinion, p.4). And even in a post-Wade case if the prosecution does not try to bolster an in-court identification by reference to an improper confrontation, and the violation either of due process or the Sixth Amendment is brought out by defense counsel as outlined by this Court in Clemons (408 F.2d, supra, at p.1237), the in-court identification may nevertheless be admissible if the Government establishes by "clear and convincing evidence" that the identification has a source independent of the improper confrontation.

The present case, however, is post-Wade, and it is one where the prosecution specifically and repeatedly sought to rehabilitate an extremely weak on-the-scene identification by testimony of the eye-witness concerning the uncounseled, single-suspect confrontation at the station house. As the Supreme Court said in Gilbert, in such a situation the prosecution is "not entitled to an opportunity to show that the testimony had an independent source" and only a per se exclusionary rule can effectively assure respect for the right to counsel.

Moreover, as already noted, the in-court identification in the present case in fact had no independent source and the Government could not make the required "clear and convincing" showing even if, contrary to the teaching of Gilbert, it were

given the opportunity. The facts establish that here Officer Gurley was the lone identifying witness. He obtained a fleeting glance of the three occupants of the Pontiac as it was parked in the middle of the night along an unlighted, tree-covered street. He had the car and its occupants under observation for a total of not more than 30 seconds, but each of the three suspects was in the coverage of the Officer's flashlight for a much shorter period of time, as he raked the light from one to the other and around the interior of the vehicle. Moreover, Officer Gurley admittedly paid little attention to the facial features of the driver of the car, concentrating instead on his "movements" (Tr. 46, supra). In his radio alert when the Pontiac sped away, the Officer stated that the only description he could give was that the driver was wearing a sweater and a suede-type jacket over the sweater. In the Officer's words, "That's all I could get" (Gov't. Exhibit 3, supra, at p.1).[6/] Physical evidence--the arrest photos--establishes the probability that even this impression was erroneous. Officer Gurley did not notice during his observation of the occupants of the car that appellant and one of his companions both have prominent scars on their foreheads. Officer Engle, who apprehended appellant and his companions on the Baltimore Beltway, had the suspects under observation for a period of time four to six times longer than Officer Gurley but, without benefit of the station house

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6/ Compare the bulletin in Clemons v. United States, ___U.S.App. D.C. ___, 408 F.2d 1230, at 1243 (1968): "Lookout for white male, 35 years of age, 6'2", 185 to 195 lbs., blond hair, light greenish-gray eyes, wearing a red checkered snap-brim cap, dark corduroy, three-quarter length coat...."

confrontation available to the latter, testified at the trial that he could not identify appellant or any of the other suspects (Tr. 115). It is submitted that this evidence falls far short of the "clear and convincing" showing of independent source required by this Court's decisions, assuming, arguendo, that the Government is entitled to make the argument at all.

Finally, even if the Court decides that no per se exclusionary rule is applicable here, still the in-court identification should have been excluded under the due process rationale of Stovall v. Denno, supra. We have already referred above to the highly suggestive character of the in-custody confrontation in this case and to the strong psychological pressure on Officer Gurley, who had let the stolen Pontiac and its occupants get away, to identify someone as the driver of the car--a pressure that could have been, but was not, neutralized by a lineup confrontation.[7/] It is submitted that these factors rendered the confrontation so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny appellant due process of law. See, Stovall v. Denno, 388 U.S., supra, at p.302.

Also pertinent to this aspect of the case is the question whether the identification was in fact reliable. As this Court has stated (Russell v. United States, supra, Slip Opinion, p.9):

7/ See Sera-Leyva v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 20,619; Slip Opinion dated February 19, 1969).

> "...[I]n post-Wade cases the excusable absence of counsel, while not dispositive, is among the 'totality of the circumstances' [quoting Stovall] bearing on the due process question. And since this case also presents a single-suspect in-custody confrontation which may be suggestive, the Court must carefully consider all possible evidence of actual unreliability in determining whether the requirements of due process have been met."

Such evidence in the present case has been canvassed in the Statement, supra, and summarized in the discussion above concerning the lack of an independent basis for the in-court identification by Officer Gurley. Consideration of that evidence leaves an abiding conviction that the Government simply failed to show that appellant was the driver of the stolen vehicle.[8/]

Aside from the in-court identification of appellant as the driver of and/or a passenger in the stolen vehicle, which should have been excluded in its entirety, there was extrinsic evidence (indeed, appellant admitted) that he was a passenger in the car in question.[9/] This raises the final question in this case whether appellant could properly be convicted as an aider and abettor.

8/ This was a crucial part of the Government's case, since the prosecution relied on inferences arising from appellant's exclusive possession of the Pontiac car in Maryland to show (1) unauthorized use of a motor vehicle within the District of Columbia and (2) transportation of that vehicle in interstate commerce between the District and Maryland.

9/ While appellant did not take the stand, the Court allowed a witness for the defense to testify on cross-examination that appellant admitted to her that he was a passenger in, but had not driven, the car in question. (Tr. 261-62).

II. There Was Insufficient Evidence to Sustain Appellant's Conviction as An Aider and Abettor *

Apparently sensing its failure to establish that appellant was the actual driver of the stolen Pontiac, the Government requested that the case be submitted to the jury on an alternative theory that appellant was guilty of aiding and abetting the unauthorized use of a vehicle and the interstate transportation of a stolen vehicle.[10/] Over defense counsel's repeated objection that there was no evidence to support such a theory (e.g., 279-80; 291-92), the Court in the course of its general discussion of the functions of the jury gave the standard aiding and abetting instruction (Tr. 306-307) to the effect that a person aids and abets another in the commission of a crime if he "knowingly associated himself in some way with the criminal venture, with the intent to commit the crime, participates in it as something he wishes to bring about, and seeks by some action of his to make it succeed." The Court correctly stressed (Tr. 306) that "[s]ome conduct by the defendant of an

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10/ That the jury also sensed this failure to prove appellant was the driver of the vehicle is implicit in their question to the Court during deliberation whether the aiding and abetting instruction would also be applicable to the interstate transportation count (Tr. 322). If the jury believed appellant had been the driver, the whole question of aiding and abetting would have been moot.

* The Transcript pages appellant wishes the Court to read with respect to Point II are set out at p. iii, supra.

affirmative character in furtherance of a common criminal design or purpose is necessary."

In the course of its more specific charge with respect to unauthorized use, the Court gave the usual "passenger" instruction in this jurisdiction to the effect that (Tr. 311-12):

> "Mere presence by a passenger in a vehicle being used or operated without the consent of the owner does not constitute unauthorized use of the vehicle or aiding and abetting such use by a passenger. The evidence must prove beyond a reasonable doubt that the passenger knew at the time he rode in the vehicle that the vehicle was being used or operated without the consent of the owner.
>
> "...[T]he difference between being an innocent passenger and being a passenger who is subject to the provision of this violation is whether or not you find beyond a reasonable doubt that he knowingly rode in the vehicle that was being used without the consent of the owner.
>
> "In short, the evidence must prove beyond a reasonable doubt that the passenger knew at the time he rode in the vehicle that the vehicle was being used or operated without the consent of the owner."

This Court has specifically disapproved the foregoing "passenger" instruction, for it permits conviction even when the passenger does not know of the unauthorized use at the time he first becomes a passenger in the car and first learns of such use only at a point in time when it is impossible to extricate himself from the venture. "It scarcely brooks

denial that a passenger is not to be convicted of aiding and abetting if he discovers only in the course of a 60 mile per hour chase that the vehicle is being operated without the owner's permission" (Jones v. United States, ___ U.S. App. D. C. ___, 404 F.2d 212, at 216 (1968)). See also Stevens v. United States, 115 U.S. App. D. C. 332, 319 F.2d 733 (1963); Kemp v. United States, 114 U. S. App. D. C. 88, 311 F.2d 774 (1962). The trial court in the Jones case, however, had earlier in its charge given an aiding and abetting instruction embracing knowledge, intent, and affirmative conduct substantially similar to that given in the present case. Accordingly, this Court declined to reverse on the basis of the erroneous passenger instruction alone, particularly when the undisputed evidence established that appellant was in fact driving the vehicle in question but claimed he had taken the wheel only to protect his juvenile female companion from "trouble," who, appellant thus implied, was the principal unauthorized user. Thus, the necessary ingredients of knowledge and affirmative conduct were plainly made out in Jones and the Court found "no error affecting substantial rights" (404 F.2d at p. 216).

In the present case, however, there is not a peppercorn of evidence tending in any way to show either intent or any affirmative conduct on appellant's part in furtherance of a criminal venture. As for knowledge, the Government at trial

relied on a number of items -- discussed below -- which neither separately nor cumulatively support a conviction of aiding and abetting in this case.

1. Presence in the Car - The Government relied on evidence that appellant was a passenger in the vehicle in question (Tr. 261-262) and that neither Stoddard nor Patterson -- the other occupants -- was known by any witness in this case to own a car (Tr. 257). This is true but totally insignificant. Moreover, the same witness testified that, unlike appellant, at least one of the other two occupants was known to drive cars although he did not own one (Tr. 257). Hence there was absolutely no reason for appellant to have been suspicious when offered a ride by his friends (Tr. 257) on the night in question.

2. The Ignition Key - The Government introduced into evidence the single key found in the ignition of the abandoned Pontiac (see Government Exhibit 7). This exhibit, the Government attorney stated (Tr. 210-211):

> "...[S]upports guilty knowledge of the car being stolen. When you see an unusual-looking key like this alone in an automobile, it supports the inference that the car was started with a non-owner's key.... Certainly, it is not a typical key that you see in a car. It is not like the type of key an owner of an automobile would use."

This is so much nonsense and demonstrates the length to which the Government was pressed in trying to make out a case

of aiding and abetting. The Court will note from even a cursory glance that the exhibit is a perfectly ordinary car key and is not unusual in any way. Indeed, as Officer Gurley's crime report stated with respect to this alleged "non-owner's" key (Government Exhibit 2, p. 4):

> "[it is a] plain copper key.... key has the appearance of a General Motor's master type, and at this time it is unknown if this key belonged to the owner of the vehicle."

Thus, the investigating officer, who as the Government itself argued was a person of some experience in these matters, saw nothing unusual in this "plain copper key" and had no reason to believe it did not belong to the owner. The Government does not say why it would hold appellant to a higher standard of knowledge, assuming he saw the key. And this raises the equally important point that there was no showing whatever that appellant in fact saw this perfectly innocuous-looking key.

3. The Broken Vent Window - Equally thin is the Government's evidence that when the Pontiac car was returned to its owner one week after the events here in question it was noticed by him that the right vent window was broken. This is exceedingly thin stuff upon which to try to deprive a person of his freedom. In the first place, Officer Gurley's exhaustive investigation report, which included a list of items found in the car (including a road map),

made no reference to a broken window. It is just as likely, if not more so, that the damage to the window occurred during the one week the car was being stored by the Baltimore County Police or during its return to Washington.

As to any implication that the occupants gained entry to the car via this vent window, the question is raised why they would go to that trouble if they had a master key in their possession as described above, for a key that will operate the ignition of a 1964 Pontiac -- the Court may judicially note -- will also open the door.

In any event, as in the case of the key, there was not a shred of evidence that appellant caused, saw, or had reason to know of, this undifferentiated vent window damage.

4. Flight and Concealment - Finally, the Government pointed to the fact that appellant and his two companions abandoned the car, left the scene on foot, and were ultimately apprehended wet and muddy, some distance away. It should be emphasized that there was no direct evidence that appellant "fled" from the scene in any normal sense of the word. He was not seen actually running away and the Government relied merely on an inference of flight, claimed to arise from the fact that appellant and his companions were found some distance away and appeared to be hot and sweating. Presumably the Government's inference from this is that "the wicked flee when no man pursueth, but the righteous are as bold as a lion." We now know, of course, that such flight

is too consistent with too many other things -- including "terrorized innocence" -- to allow it to be the basis for an inference of guilt. Bailey v. United States, ____U. S. App. D. C.____, ___F. 2d ___(No. 21, 428; Slip Opinion dated March 7, 1969); Austin v. United States, ___U. S. App. D. C. ___, ___F. 2d ___(No. 22, 044; Slip Opinion dated May 27, 1969).

As the Court in Bailey said of a similar attempt to rely on flight as evidence of guilty participation (Slip Opinion, p. 9; notes omitted):

> "With cautious application in appreciation of its innate shortcomings, flight may under particular conditions be the basis for an inference of consciousness of guilt. But guilt, as a factual deduction, must be predicated upon a firmer foundation than a combination of unelucidated presence and unelucidated flight. Here there was no evidentiary manifestation that the appellant was prompted by subjective considerations related in any wise to the crime."

The present case is undistinguishable, and, even assuming that appellant's "flight" here did show an awareness that something wrong had occurred, there is no necessary or even probable connection between his flight and the particular wrong of unauthorized use.

Moreover, even if appellant had reason to know, when his companions fled, that the use of the automobile was unauthorized, such eleventh-hour knowledge, even coupled with his own flight, still is not enough to show that he associated

himself with the venture, "that he participate[d] in it as something he wish[ed] to bring about, that he [sought] by his action to make it suceed" (Nye & Nissen v. United States, 336 U. S. 613, at 619 (1949)).

In short, the Government's ambiguous evidence left too much room for the jury to engage in speculation and surmise in convicting appellant as an aider and abettor. See Bailey v. United States, Kemp v. United States, Stevens v. United States, supra. A verdict based on such conjecture cannot stand and the district court erred in refusing to grant a judgment of acquital n.o.v.

Conclusion

For all of the reasons set out above, the judgment below should be reversed and the case remanded with instructions to dismiss the indictment.

Respectfully submitted,

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August 7, 1969

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